

REMARKS

The Final Office Action of October 27, 2005, has been considered by the Applicant. No claims are amended in this response. Claims 1-8 remain pending. Applicant requests reconsideration of the application.

Claims 1-8 were rejected under 35 U.S.C. 103(a) as unpatentable over admitted prior art in view of the Brochure of Brightline Nylon-AB. Applicant traverses the rejection.

In the prior response of 10 August 2005, Applicant submitted a declaration offering evidence of secondary considerations in this application. The declaration was directed towards a showing of long-felt need and commercial success.

With regard to long-felt need, the Examiner replied that the body of knowledge in the art of brushes as it pertains to the inclusion of anti-microbial agents into plastic brush filaments was not old enough to support such an argument. He stated that it was not as if such filaments had been known for 50 years and no one in the art had ever thought of producing the claimed device or solving the problem addressed by the Applicant.

The Examiner's rejection of long-felt need appears to be based on the contention that the need has not been felt for long enough. Though the Examiner states a period of 50 years, Applicant has been unable to find a source, either in the MPEP or a court case, which states that the need must be felt for that specific length of time. The prior declaration stated that the need for brushes with improved cleaning and sterilizing ability has been felt for many years; see ¶ 8. Efforts have been made to solve that problem, such as by finding a way around it by use of disposable brushes or by the use of sterilizing equipment; see ¶ 8. As one example, Applicant notes US Patent 5,168,593, which was filed in 1991. However, the need continues to exist. The declaration also shows that no one in the art had previously thought of producing the claimed device. The prior declaration stated that prior to January 2003, the claimed device was unknown in the US to the best of the Applicant's knowledge; see ¶ 7. As an expert in his field, the Applicant's opinion should be given due weight. A new declaration is also submitted along with this response. In it, the Applicant declares that as of now, to his knowledge no other company sells a cleaning brush with anti-microbial filaments; see

¶¶ 10, 11 . This evidence tends to show that no one in the art had thought of producing the claimed device; this indicates non-obviousness. Applicant does not argue that no one in the art thought of solving the problem addressed here. Applicant argues that (1) no one in the art has successfully addressed the problem such that it no longer exists and (2) no one in the art has addressed the problem through the claimed device.

The Examiner rejects the commercial success argument on the ground that the sales are not proved to be directly derived from the invention claims (emphasis added). He states that conclusory opinions that increased sales are due to the merits of the invention are entitled to little weight and that inventor's opinion as to purchaser's reason for buying the product is insufficient to demonstrate a nexus between the sales and the claimed invention. Merely showing that there was commercial success of an article embodying the invention is not sufficient. The Examiner's rejection cites several cases cited in MPEP § 716.03(b).

Applicant submits that the Examiner did not give due weight to the factual evidence presented in the prior declaration. In particular, the tables showing unit sales and gross receipts prior to and after the introduction of the claimed device show that increased sales are directly derived from the invention claims. The sole difference between the brushes sold in 2001-2002 and 2003-2005 was that the bristles had anti-microbial properties; see ¶ 9. Because this is the claimed feature, the Applicant has made the showing required by *In re Huang* (1) to establish a nexus between the sales and the claimed invention and (2) for the evidence to be accorded substantial weight; see MPEP § 716.03(b)(I). Prior to the introduction of the claimed device, unit sales and gross receipts grew about 5%; see the table in ¶ 5. After the device was introduced in January 2003 (i.e. the beginning of that year), unit sales grew 43%, 33%, and 25% from 2003 to 2005. Even discounting the prior rate of growth, unit sales (and gross receipts) of the claimed device grew at a rate greater than expected. The new declaration also makes these statements; see ¶¶ 5, 7, 8 (these 2005 unit sales and gross receipts are final, not projected as in the prior declaration). Such results are evidence of non-obviousness; see MPEP § 716.02(a).

Applicant disagrees with the Examiner's statement that the declaration *merely* shows commercial success of an article embodying the invention. The Applicant has

provided evidence that the success of the claimed device was not due to heavy advertising or shifts in advertising; see ¶ 11 of the prior declaration. In the new declaration, Applicant makes further specific statements that show advertising was not a factor in the commercial success; see ¶¶ 13-17. In fact, advertising expenditures decreased and sales still increased. Consumption by purchasers normally tied to Applicant is not a factor; see ¶ 12. In other words, the Applicant has not shown *mere* commercial success, but success that is directly derived from the invention claims. Please realize that the cases cited in MPEP § 716.03(b) essentially state that the Applicant should show the commercial success is *not* the result of other possible contributing factors. The cases do not require the Applicants to prove the commercial success is not the result of *all* imaginable contributing factors; see the cite to *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.* The factual evidence in the prior declaration and the new declaration make this showing.

For the above reasons, Applicant believes the secondary considerations indicate non-obviousness of the claimed device. Withdrawal of the 103(a) rejection is requested

CONCLUSION

It is respectfully submitted all claims remaining in the application (Claims 1-8) are now in condition for allowance. Applicant requests withdrawal of the rejections and issuance of a Notice of Allowance.

Respectfully submitted,

FAY, SHARPE, FAGAN,
MINNICH & McKEE, LLP

January 20, 2006
Date

Thomas E. Young
Thomas E. Young
Reg. No. 28,924
1100 Superior Avenue
7th Floor
Cleveland, Ohio 44114-2579
(216) 861-5582